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No. 94-2082

In The

Supreme Court of the United States

October Term, 1995

MAHFOUZ EL SHAHAWY, M.D. and MAHFOUZ EL SHAHAWY, M.D., P.A.,

Petitioners,

v.

WILLIAM T. HARRISON, JR., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's ruling that the arbitration panel was not guilty of misconduct by its refusal to admit in evidence a proffered document.*

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*The statement of Questions Presented For Review in the petition is misleading by asserting baldly (a) that the arbitrators "indisputably" were guilty of misconduct, and (b) that the evidence in question was "pertinent and material" to the controversy. This brief will show that the document in question (the so-called "TECS Report") was not pertinent or material within the meaning of the arbitration statute and that the arbitrators clearly were not guilty of misconduct.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Kespondents respectfully pray that the Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF CASE

Petitioner, Mahfouz El Shahawy, was a member of the medical staff of Sarasota Memorial Hospital, owned and operated by defendant Sarasota County Public Hospital Board. Petition, p.1.

In 1982 the Hospital Board denied Shahawy's application for privileges in the cardiac catheterization laboratory. Shahawy filed suit in the federal district court alleging antitrust, civil rights and RICO claims, plus pendent state law claims. The district court dismissed that complaint. The Eleventh Circuit affirmed in part and reversed as to the antitrust counts. *Shahawy v. Harrison*, 778 F.2d 636 (11th Cir. 1985), *modified*, 790 F.2d 75 (11th Cir. 1986).

During pendency of that first appeal, the Hospital Board declined to renew Shahawy's medical staff membership. Following remand, the complaint was amended to include that non-renewal, alleging antitrust, civil rights, RICO and various state claims. In addition to the Hospital Board, the amended complaint named 17 defendants, including four administrators, two attorneys and 11 physicians. Again, the district court ruled in favor of the defendants. Again, the Eleventh Circuit affirmed except for the antitrust claims. *Shahawy v. Harrison*, 875 F.2d 1529 (11th Cir. 1989). The opinion noted that substantial competent evidence supported the decision to terminate Shahawy's medical staff membership, and that Shahawy had received more than minimum procedural due process. *Id.*, 875 F.2d at 1533-1534. Thus, the two Eleventh Circuit opinions do not support Shahawy's assertions of a vendetta.

In 1991, the parties agreed to mediation of the remaining antitrust claims. R1-473,474. A settlement resulted which included an agreement to "final, binding, and enforceable" arbitration of the antitrust claims. R1-483 Ex. A,B. The three member arbitration panel was selected from a list of 22 retired federal judges. *Id.* After a

12-day evidentiary hearing, hundreds of documentary exhibits and extensive post-hearing memoranda, the arbitration panel ruled in favor of all defendants, stating simply that "the plaintiffs have failed to prove any violation of federal or state antitrust laws." RJ-483 Ex. F.

The district court denied Shahawy's petition to vacate the arbitration award.[1] The Eleventh Circuit affirmed the district court's order without opinion. 51 F.3d 1049 (11th Cir. 1995).

The order of the district court included a ruling that exclusion of the TECS Report was not improper; the parties had waived the right to challenge the award on the ground of an erroneous evidentiary ruling, and the exclusion was not "egregious error." Order, App. pp. 3-5. The petition challenges only the affirmance of exclusion of the TECS Report. Petition, pp. 16-24.

SUMMARY OF ARGUMENT

The sole ground for this petition is that the arbitrators improperly excluded the TECS Report and that the district court and the court of appeals improperly refused to vacate the award for that reason.

That claim is untenable because Shahawy expressly waived any right to challenge the award on the ground that the arbitrators were guilty of misconduct by failing

[1] The order of the district court is provided as an appendix to this brief. It is cited as "Order, App. p. ___." The per curium order of the court of appeals is also included as an appendix.

to consider pertinent or material evidence. Moreover, the TECS Report was not "pertinent and material to the controversy" within the meaning of the federal arbitration statute, so that exclusion of this evidence could not be misconduct.

This petition falls far outside the criteria for certiorari petitions set forth in Rule 10. There is no conflict with decisions of other courts. The per curiam opinion of the court of appeals does not present any important federal question. It does not establish any precedent. It simply affects the medical staff of a single physician. The basic issue is correctness or incorrectness of an evidentiary ruling by arbitrators. There is no national significance worthy of this Court's attention.

Subsequent to the judgment of the Eleventh Circuit, this Court announced *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920 (1995), concerning courts of appeals' standard of review of district court decisions confirming arbitration awards. That opinion does not affect this petition in view of the overwhelming correctness of the opinion of the district court in this case.

ARGUMENT

REASONS FOR DENYING WRIT

I. Exclusion Of The TECS Report Was Not Misconduct On The Part Of The Arbitrators.

The petition asks this Court to monitor the arbitrators' exercise of discretion within their authority. There

are no special circumstances which might call for granting this petition.

The sole claim in the petition is that "[t]he Arbitrators knowingly and unlawfully excluded a singularly critical piece of evidence – the 'TECS Report,' " contrary to 9 U.S.C.A. §10(a) (3). Petition, p. 16. The statute provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
>
> * * *
>
> (3) Where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy;

The TECS Report (Training, Education and Consulting Services Report) is described in the Order as a document prepared by an outside consultant for the purpose of assessing the current (1990) status of the Cardiovascular Program with special emphasis on the cardiac catheterization laboratory. The report was compiled by a behavioral psychologist, not a physician, based on his interviews with certain cardiac catheterization laboratory personnel. R1-482. Thus it was basically hearsay. The petition contends that the TECS Report, prepared in 1990, reveals the motivation of the Hospital Board in ruling adversely to Shahawy years before in 1983. Petition, p. 22.

The district court upheld exclusion by the arbitrators on the following two grounds.

A. Shahawy expressly waived any objection based on exclusion of evidence.

In the Arbitration Agreement, Shahawy agreed:

> In making decisions about discovery and information exchange procedures, admission of evidence, and all other matters, the Arbitrators shall balance the need to consider the evidence against the goal of this Agreement to ensure that the dispute Plaintiffs and Defendant (sic) is resolved in a timely and cost-effective way. So long as the Arbitrators allow (1) the written oral submissions provided for in this Agreement to be made and (2) the time set out in this Agreement for preparation and hearing, no Party shall challenge the Award on the ground that the arbitrators were guilty of misconduct by failing to consider pertinent or material evidence or by failing to postpone the hearing.

R1-483 Ex. B; Order, p. App. 3.

The parties are free to set such ground rules. *United Paperworkers Int. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 39, 108 S.Ct. 364, 9 L.Ed. 2d 286 (1987). Shahawy did not raise any question as to the conditions of the waiver.

B. Exclusion Of The TECS Report Was Not "Egregious Error."

Federal courts applying section 10(a) (3) generally do not focus on literal tests of "pertinent" or "material."[2]

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[2] The TECS Report was conceivably neither "pertinent" nor "material" under dictionary definitions of those terms. The

Instead, they customarily look at whether exclusion of "relevant" evidence "so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985), quoting *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir.), *cert. denied*, 393 U.S. 954, 89 S.Ct. 378, 21 L.Ed. 2d 365 (1968). Here the district court followed that trend, citing *Hunt v. Mobil Oil Corp.*, 654 F.Supp. 1487, 1512 (S.D.N.Y. 1987), for the principle that vacatur is justified only by finding a "most egregious error" on the part of the arbitrator. Order, App. p. 4. In this connection, the district court held:

> The Court finds that the arbitrators' refusal to receive the TECS Report was not an "egregious error which resulted in adversely affecting the rights" of the plaintiffs. The TECS Report was compiled in 1990, years after this case was filed. There is no indication that the scenarios depicted in the TECS Report took place during the period of time relevant to this case. Assuming *arguendo* that the TECS Report does accurately depict the cardiovascular program at the times relevant to this case, the plaintiffs had ample opportunity to offer proof of their theory by providing direct evidence. The plaintiffs failure to do so does not create the exceptional circumstances contemplated in the case law

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panel arguably was required to hold there was no antitrust violation by virtue of the doctrine of state action immunity delineated in City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed 2d 382 (1991). In that circumstance, the Report would have been completely irrelevant.

> vacating arbitrator awards. In sum, the Court finds that the plaintiffs have failed to meet their burden to establish that the TECS Report was improperly excluded.

Order, App. p. 5. The court of appeals did not need to write an opinion to agree with that sound reasoning.

Moreover, the district court's order shows that the arbitration panel heard extensive argument as to reception of the TECS Report. Order, App. p. 4 n.4. This further demonstrates that Shahawy received the "fair hearing" contemplated by *Hoteles Condado Beach. See Cordis Corp. v. C.R. Bard, Inc.*, 1993 WL 723844 3 (S.D. Tex. March 11, 1993) ("Because the arbitrator is judge of the admissibility and relevance of evidence submitted in an arbitration proceeding, and because the arbitrator in this proceeding entertained argument on the relevancy of evidence derived from test performed on used balloons before deciding to exclude it as irrelevant, the arbitrator's decision to exclude this evidence did not prevent Cordis from receiving a fundamentally fair hearing.")

II. This Case Does Not Have Broad National Significance.

Despite agreeing to binding arbitration, Shahawy is unhappy with the result. Two federal courts have upheld that result. Now Shahawy relies on a single evidentiary ruling by the arbitrators to ask this Court to rexamine the enormous arbitration record.

The weakness of the petition is emphasized by the fact that all parties to the arbitration expressly waived any right to challenge the award on the ground that the

arbitrators had improperly excluded pertinent or material evidence.

This case does not even approach the general criteria set forth in Rule 10 of the Supreme Court Rules. There is no conflict with decisions of other courts interpreting 9 U.S.C.A. §10(a) (3). The materiality of the TECS Report – discussing events occurring years after the last amendment of the complaint – is not such an important federal question as to deserve the attention of this Court.

This case involves the qualifications of one physician to be a member of the medical staff of a major hospital. It is a "peer review" controversy depending solely on its own particular facts. It will not establish any precedent, not even for subsequent peer review proceedings at this same hospital. National significance – even local significance – is completely lacking.

III. Evaluation Of This Petition Is Not Affected By This Court's Recent Opinion Concerning Standard Of Review.

The judgment of the Eleventh Circuit in this case was entered on March 20, 1995. On May 22, 1995 this Court decided *First Options of Chicago Inc. v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920 (1995). The *First Options* opinion will undoubtedly provide guidance to the Eleventh Circuit in the future, but it does not affect this petition.

In *First Options*, the Court was reviewing a decision of the Third Circuit concerning arbitrability of a dispute, not exclusion of evidence by an arbitrator. In discussing standard of review of district court arbitration decisions,

the Court criticized *Robbins v. Day*, 954 F.2d 679, 681-682 (11th Cir. 1992), which explained reasons for applying a specially lenient abuse of discretion standard when reviewing district court decisions that confirm arbitration awards. *Id.*, 115 S.Ct. at 1926.

The per curiam judgment of the Eleventh Circuit does not state that it was applying a lenient standard of review.

The Eleventh Circuit affirmance cites 11th Cir. R. 36-1. App. p. 8. That rule provides in pertinent part:

> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> * * *
>
> (e) judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

This is not a case where the court of appeals wrote a long opinion holding that there were valid arguments both ways but that its "lenient standard" impelled it to uphold the district court. To the contrary, the district court's opinion is so overwhelmingly correct that the court of appeals found no need to write any opinion, and so affirmed per curiam.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAHFOUZ EL SHAHAWY, M.D., etc., et al.,

Plaintiffs,

v.

Case No. 82-1207-CIV-T-WC

WILLIAM T. HARRISON, JR., et al.,

Defendants.

ORDER

Before the Court is the plaintiffs' motion to vacate arbitration award, (D-482) and defendants' motion for enforcement of settlement agreement (D-483).[1]

The facts and procedural history emanating from this case are extensive. The Court need not repeat them here because they are reported at 778 F.2d 636 (11th Cir. 1985), *modified*, 790 F.2d 75 and 875 F.2d 1529 (11th Cir. 1989). The plaintiffs seek vacation of the arbitration award pursuant to 9 U.S.C. § 10, and progeny case law. Section 10 provides:

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[1] Plaintiffs' petition has been filed in violation of Middle District of Florida Local Rule 3.01(c) to the extent that the petition exceeds twenty pages in length. The Court directs plaintiffs' counsel to refrain from making non-relevant, personal and superfluous comments about opposing counsel or parties in pleadings submitted to the Court.

> (a) In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The plaintiffs set forth six arguments in support of their petition.

As a threshold matter, it should be noted that the burden to establish these claims rests squarely upon the plaintiffs. Furthermore, judicial review of arbitration awards is very limited. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 778 (11th Cir. 1993). The Eleventh Circuit has set forth the following framework for analyzing an arbitration award:

> The FAA (Federal Arbitration Act) presumes that awards will be confirmed, 9 U.S.C. § 9, and enumerates only four narrow bases for vacatur. . . . In addition to these four statutory grounds for vacatur, we have recognized two

> additional non-statutory bases upon which an arbitration award may be vacated. First, an arbitration award may be vacated if it is arbitrary and capricious. Second, an arbitration award may be set aside if contrary to public policy.

Id. at 778-79 (citations omitted).[2]

The plaintiffs first argue that "the [a]rbitrators knowingly and unlawfully excluded a singularly critical piece of evidence – the "Training, Education and Consulting Services Report" ("TECS Report").[3] The TECS Report was prepared by an outside consultant "for the purpose of

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[2] The plaintiffs do not argue that the arbitrators' award was arbitrary and capricious or contrary to public policy. Accordingly, the Court will limit its analysis to the statutory grounds for vacatur as set forth in 9 U.S.C. § 10.

[3] For reasons unknown to this Court, the argument and subsequent panel ruling were not reported as part of the transcript testimony.

Paragraph 7.1 of the parties' Arbitration Agreement provides:

> In making decisions about discovery and information exchange procedures, admission of evidence, and all other matters, the Arbitrators shall balance the need to consider the evidence against the goal of this Agreement to ensure that the dispute between Plaintiffs and Defendant [sic] is resolved in a timely and cost-effective way. So long as the Arbitrators allow (1) the written oral submissions provided for in this Agreement to be made and (2) the time set out in this Agreement for preparation and hearing, no party shall challenge the Award on the ground that the Arbitrators were guilty of misconduct by failing to consider pertinent or material evidence or by failing to postpone a hearing.

assessing the current status of the Cardiovascular Program with special emphasis on the Heart Catheterization Laboratory." In their current motion, the plaintiffs spend a significant amount of time relaying the contents of the TECS Report, while advancing few substantive arguments on its alleged wrongful exclusion. The arbitration panel apparently excluded the TECS Report based upon the following grounds: (1) hearsay; (2) irrelevance; and (3) Evidence Rule 403.[4]

Federal Courts, in dealing with an arbitrator's refusal to hear evidence, have held that "[o]nly the most egregious error which resulted in adversely affecting the rights of a party would justify the application of the rule (9 U.S.C. § 10(c)) and require vacatur of an award." *Hunt v. Mobil Oil Corp.*, 654 F.Supp 1487, 1512 (S.D.N.Y. 1987). Furthermore, absent exceptional circumstances, a reviewing court may not overturn an arbitrator's determination of the relevancy or persuasiveness of evidence submitted. *Hoteles Condado Beach, La Concha and Convention Center v.*

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[4] At the arbitration hearing, the plaintiffs also contended that the TECS Report was admissible because it was not within the purview of Florida Statute § 768.40. Section 768.40 shields investigations, proceedings and records of a committee/board "in any civil or administrative action against any provider of professional health services arising out of the matters which are the subject of evaluation and review" by such committee/board. The defendants argued, *inter alia*, that 768.40 precluded admissibility of the TECS Report because it fell squarely within the language of the statute. The arbitrators found, however, that § 768.40 could not bar the admissibility of such evidence in the trial of a federal cause of action. The Court need not resolve this issue because the Court finds that the arbitration panel properly excluded the TECS Report on separate grounds.

Union De Tronquistas Local 901, 763 F.2d 34, 39-40 (1st Cir. 1985).

The Court finds that the arbitrators' refusal to receive the TECS Report was not an "egregious error which resulted in adversely affecting the rights" of the plaintiffs. The TECS Report was compiled in 1990, years after this case was filed. There is no indication that the scenarios depicted in the TECS Report took place during the period of time relevant to this case. Assuming *arguendo* that the TECS Report does accurately depict the cardiovascular program at the times relevant to this case, the plaintiffs had ample opportunity to offer proof of their theory by providing direct evidence. The plaintiffs failure to do so does not create the exceptional circumstances contemplated in the case law vacating arbitrator awards. In sum, the Court finds that the plaintiffs have failed to meet their burden to establish that the TECS Report was improperly excluded.

The plaintiffs next argue that the arbitrators improperly denied discovery of the "Horty, Springer & Mattern documents" ("Horty documents"). Horty, Springer & Mattern, a law firm, represented the Hospital during the period of time when Dr. Shahaway's medical privileges were terminated.[5] After a hearing and *in camera* review of the documents, the chairman of the arbitration panel denied the plaintiffs' motion to compel production based upon the attorney-client privilege. At the arbitration

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[5] The Hospital Board voluntarily produced certain documents produced between it and the law firm. It objected, however, to the production of those documents which contained the mental impressions of counsel.

hearing the plaintiffs made a similar request, which was again denied by the chairman.[6]

The Court finds that, under the preceding authority, the plaintiffs have failed to meet their burden to show that the arbitration panel improperly denied discovery of the Horty documents.

The plaintiffs next argue that: (1) the arbitrators' failure to enter an award within the allotted time [under the arbitration agreement] requires vacatur of the award;[7] (2) there was evident partiality in the arbitrators; (3) there was a repudiation of the agreement by the defendants; and (4) the award was procured by undue means.

The plaintiffs have failed to cite legal authority to support these arguments. Notwithstanding the plaintiffs' failure in that regard, the Court again finds that the plaintiffs have failed to meet their burden.

Accordingly, it is ORDERED:

(1) That the plaintiffs' motion to vacate arbitration award (D-482) is DENIED.

(2) That the defendants' motion for enforcement of settlement agreement (D-483) is GRANTED and Endispute, Inc. is ORDERED to deliver the original mutual release executed by the plaintiffs and original

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[6] The designated United States Magistrate Judge considered and denied the same request by Orders of August 4, 1986, and August 25, 1986.

[7] The case cited by plaintiffs, *Ierna v. Arthur Murray Int'l, Inc.*, 833 F.2d 1472 (11th Cir. 1987), does not stand for the proposition asserted.

stipulation for dismissal with prejudice executed by counsel for the parties.

(3) That this case is DISMISSED.

DONE AND ORDERED at Tampa, Florida this 8th day of SEPT., 1993.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
UNITED STATES
DISTRICT JUDGE

Copies to
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3367

D. C. Docket No. 82-1207-CIV-T-15

MAHFOUZ EL SHAHAWY, M.D., M.S., F.A.C.C., Individually and MAHFOUZ EL SHAHAWY, M.D., P.A., a Florida Professional Assoc.,

Plaintiff-Appellant,

versus

WILLIAM T. HARRISON, JR., Individually,
F. EDWARDS RUSHTON, M.D., Individually,
JOHN N. CARLSON, M.D., Individually,
WILLIAM L. PAGE, M.D., Individually,
RICHARD J. SARKIS, M.D., Individually, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(March 20, 1995)

Before COX and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against plaintiff-appellant."

Judgment Entered: March 20, 1995
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: APR 28 1995